Supreme Court, U.S.
FILED
JUN 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1837

In the Supreme Court of the United States

OCTOBER TERM, 1985

MITCHELL BLOCK, ETC., ET AL., PETITIONERS

v.

EDWIN MEESE III, ATTORNEY GENERAL OF THE UNITED STATES, AND JOSEPH E. CLARKSON

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
LEONARD SCHAITMAN
HAROLD J. KRENT
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

23pp

QUESTIONS PRESENTED

1. Whether the films in question were properly classified as "political propaganda" within the meaning of the Foreign Agents Registration Act, 22 U.S.C. 611(j).

2. Whether a regulation promulgated by the Department of Justice exceeds its statutory authority under the Foreign Agents Registration Act, 22 U.S.C. 611 *et seq.*

3. Whether the use of the term "political propaganda" in the Foreign Agents Registration Act, which is expressly defined in the Act in a neutral and valid way, violates the First Amendment because in common usage the word "propaganda" might be understood to have a pejorative meaning.

4. Whether petitioners, who are not foreign agents under the Act and are not subject to the requirements or sanctions of the Act, have standing to challenge the constitutionality of the statutory term "political propaganda."

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Califano v. *Yamasaki*, 442 U.S. 682	10
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837	15
Coleman v. *Paccar Inc.*, 424 U.S. 1301	9
E.I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112	10
Greene v. *McElroy*, 360 U.S. 474	18
Hannah v. *Larche*, 363 U.S. 420	18
Johnson v. *Fleet Corp.*, 280 U.S. 320	17-18
Keene v. *Smith*, 569 F. Supp. 1513, subsequent opinion, 619 F. Supp. 1111, prob. juris. noted *sub nom. Meese* v. *Keene*, No. 85-1180 (Apr. 21, 1986)	7, 8, 14
McCulloch v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10	16, 18
Meese v. *Keene*, prob. juris. noted, No. 85-1180 (Apr. 21, 1986)	*passim*
Merck & Co. v. *Staats*, cert. before judgment denied, 449 U.S. 1038	11, 18
New Haven Inclusion Cases, 399 U.S. 392	18
Porter v. *Dicken*, 328 U.S. 252	17
Porter v. *Lee*, 328 U.S. 246	17
SmithKline Corp. v. *Staats*, cert. before judgment denied, 449 U.S. 1038	11, 18
Taylor v. *McElroy*, 360 U.S. 709	18
United Parcel Service, Inc. v. *Mitchell*, 451 U.S. 56	10

Cases—Continued: Page

United States v. *Albertini*, No. 83-1624 (June 24, 1985) 13
United States v. *Mendoza*, 464 U.S. 154 10
Washington v. *Fishing Vessel Ass'n*, 443 U.S. 658 .. 18

Constitution, statute, regulation and rule:

U.S. Const.:
Art. III 6
Amend. I 5-6
Foreign Agents Registration Act of 1938, 22 U.S.C. 611 *et seq.* 2
22 U.S.C. 611(b)(1) 2
22 U.S.C. 611(c) 3
22 U.S.C. 611(j) 3, 13, 14
22 U.S.C. 611 note 2
22 U.S.C. 612 3
22 U.S.C. 614(a) 3, 4, 13, 14, 15
22 U.S.C. 614(b) 3
22 U.S.C. 614(c) 3
22 U.S.C. 616(a) 4
22 U.S.C. 620 14
28 C.F.R. 5.401(b) 4, 14
Sup. Ct. R. 18 9

Miscellaneous:

H.R. Rep. 1470, 89th Cong., 2d Sess. (1966) 8, 9, 14

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1837

MITCHELL BLOCK, ETC., ET AL., PETITIONERS

v.

EDWIN MEESE III, ATTORNEY GENERAL OF THE UNITED STATES, AND JOSEPH E. CLARKSON

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the district court (Pet. App. 1a-37a) is reported at 583 F. Supp. 1288.

JURISDICTION

The judgment of the district court (Pet. App. 38a) was entered on April 2, 1984. On May 16, 1984, petitioners filed a notice of appeal to the United States Court of Appeals for the District of Columbia Circuit (No. 84-5318). The court of appeals heard

argument on February 12, 1985, but has not yet rendered a decision. The petition for a writ of certiorari before judgment was filed on May 5, 1986. The jurisdiction of this Court to review the case by the writ of certiorari before final judgment in the court of appeals is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

STATEMENT

1. This case, like *Meese* v. *Keene*, prob. juris. noted, No. 85-1180 (Apr. 21, 1986), arises under the Foreign Agents Registration Act of 1938 (FARA), 22 U.S.C. 611 *et seq.* As Congress has explained, it is

> the policy and purpose of this Act * * * to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.

22 U.S.C. 611 note.

FARA establishes a comprehensive scheme of registration, reporting, and disclosure for "agents" of "foreign principals." The Act defines "foreign principal" to include "a government of a foreign country." 22 U.S.C. 611(b)(1). In addition, it defines "agent of a foreign principal" to mean in relevant part "any person who acts as an agent, representative, employee, or servant * * * of a foreign principal" and "who directly or through any other person

* * * engages within the United States in political activities for or in the interests of such foreign principal." 22 U.S.C. 611(c).

An agent of a foreign principal as defined in the Act is required to file with the Attorney General a registration statement incorporating specified information. 22 U.S.C. 612. In addition such agent is required to submit to the Attorney General a copy of any "political propaganda for or in the interests of such foreign principal" that the agent transmits in the United States mail or by any means of interstate or foreign commerce. 22 U.S.C. 614(a). The Act defines the term "political propaganda" to include any communication that:

> is reasonably adapted to * * * in any * * * way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country * * * or with reference to the foreign policies of the United States.

22 U.S.C. 611(j).

The agent must mark any such materials with an identification statement that sets forth the relation between the agent and the materials, explains that the agent is registered with the Department of Justice under the Act and discloses the name of the agent and the foreign principal, advises that the agent's registration statement and the disseminated materials are available for inspection at the Department of Justice, and contains a disclaimer that registration of the agent does not indicate approval by the United States of the contents of the materials. 22 U.S.C. 614(b); see also 22 U.S.C. 614(c). The standard form of the identification statement for films does not use the statutory term "political propaganda" and reads as follows:

> This material is prepared, edited, issued or circulated by (name and address of registrant) which is registered with the Department of Justice, Washington, D.C. under the Foreign Agents Registration Act as an agent of (name and address of foreign principal). Dissemination reports on this film are filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of this material by the United States Government.

C.A. App. 257. The labeling requirement is applicable only to agents of foreign principals under the Act and does not apply to subsequent disseminators or recipients of the materials, such as petitioners. In fact, such people are free to remove the identification statement that the foreign agent was required to affix to the materials (Pet. App. 5a-6a, 15a-16a, 31a).

Finally, the Act requires the agent to submit to the Attorney General a report setting forth the places, times, and extent of the agent's dissemination of "political propaganda" for or in the interests of the foreign principal. See 22 U.S.C. 614(a); see also 22 U.S.C. 616(a). A regulation of the Department of Justice provides that the dissemination report shall "[l]ist the names and addresses of persons or organizations receiving 100 copies or more [of the materials]" and, for films, identify the "[n]ame of station, organization, or theater using [the films]," the "[d]ate or dates [the films were] broadcast or shown," and the "[e]stimated attendance." See 28 C.F.R. 5.401(b), incorporating by reference DOJ Form OBD-69 (Pet. App. 44a-45a).

2. The National Film Board of Canada (Ottawa) produces films in Canada. It is an agency of the government of Canada and thus a "foreign principal" under the Act. The National Film Board of Canada (New York office) (NFBC-NY) is the agent of the National Film Board of Canada (Ottawa) in the United States and since 1947 has registered with the Attorney General pursuant to FARA (Pet. App. 6a). In a recent registration statement, the NFBC-NY has described its activities in part as the "[p]romotion and distribution through commercial and non-commercial channels of Canadian Government information" (*id.* at 7a). In complying with the provisions of FARA, the NFBC-NY does not routinely label its materials in the first instance but instead submits films as requested by the Department of Justice for a determination of those that are covered by the Act (*ibid.*).

In 1982, the NFBC-NY submitted to the Department a list of 62 films and videotapes that it had distributed during that year. The Department reviewed five of the films and concluded that three of them included "political propaganda" within the meaning of the Act. Two of the films, *Acid from Heaven* and *Acid Rain: Requiem or Recovery*, address the subject of acid rain; the third film, *If You Love This Planet*, concerns nuclear war. Pet. App. 8a. The same three films are at issue in *Meese* v. *Keene*, *supra*.

3. On March 9, 1983, petitioners commenced the instant action for declaratory and injunctive relief in the United States District Court for the District of Columbia. They argued that the use of the term "political propaganda" in FARA, as applied to the three films in question, violated the First Amend-

ment. In addition, they challenged the Department of Justice's classification of the films as "political propaganda" within the meaning of the statute. Finally, they contested the validity of the Department's regulation prescribing the contents of the required dissemination reports.

Without reaching the merits, the district court dismissed the action for lack of standing (Pet. App. 1a-37a). "Upon close examination of the complaint, affidavits and declarations submitted to the Court by [petitioners], and after construing these documents in favor of [petitioners]" (*id.* at 14a), the court concluded that petitioners "failed to meet their burden" (*id.* at 15a) to establish Article III standing because of the absence of cognizable " 'injury in fact' " and the lack of any alleged injury that is "fairly traceable to [respondents'] conduct" (*id.* at 11a).

The district court first noted that petitioners "have not alleged that their rights to obtain, exhibit or view the three films have been interfered with because of the Department of Justice action" and that "[i]ndeed, it is undisputed that they could not allege such injury because the FARA does not prohibit foreign advocacy or place any limitations on the availability or showing of any material deemed to be 'political propaganda' " (Pet. App. 15a). Likewise, the court noted "that the registration, dissemination, and labelling requirements of the FARA do not apply to any of the [petitioners] in this case" (*id.* at 15a-16a) since they are not foreign agents under the Act.

Although not directly subject to FARA, petitioners alleged three types of harm to themselves from the application of the statute to the Canadian films. First, they contended that the statutory phrase "political propaganda" is a pejorative term that stig-

matizes them as distributors and exhibitors of the films. Second, they asserted economic injury because of the alleged adverse reaction of potential viewers to the fact that the film had been determined to meet the statute's definition of "political propaganda." Third, petitioners argued that the term "political propaganda" disparaged the films and prejudiced viewers against their content, thus chilling petitioners' right to exhibit the films and interfering with their ability to communicate effectively.

All of these alleged injuries rest at bottom on the contention that the term "political propaganda" as used in FARA is pejorative and derogatory. The district court found no basis for that claim and concluded that the asserted harm to petitioners is at best "highly speculative" (Pet. App. 23a) and "in all likelihood * * * non-existent" (*id.* at 25a):

> In order to find allegations of factually specific injury, the Court would be forced to make several assumptions concerning the reaction of the public to the listing of plaintiffs in the dissemination reports. First, the Court would have to assume that the public would react negatively to a film labelled "political propaganda" despite the neutral definition of the term provided in the FARA. *See* 22 U.S.C. § 611(j). Additionally, the Court would have to assume that this "negative reaction" would cause potential audience members to discount the films' messages or avoid the films completely. Finally, the court would have to assume that the public will lose respect for the plaintiffs because they chose to show the movies, even though it is clear that the FARA does not, on its face denigrate the "aesthetic, artistic or educational merits" of the films. The Court cannot make such assumptions for the

> plaintiffs in the absence of any facts tending to show that such fears are concrete or likely to materialize as actual injury.

Id. at 23a-24a (footnotes omitted). Emphasizing that "FARA does not define the term ['political propaganda'] in any negative fashion" (*id.* at 26a n.9) and that the statutory definition is "neutral [and] non-pejorative" (*id.* at 27a), the court found that the injuries alleged by petitioners "would be due to the public's false impression that the government had negatively classified the films rather than due to the government's attaching of a neutrally defined word under the FARA" (*id.* at 26a n.9) and that "nothing the government has said or done can reasonably be interpreted to lead to [such injuries]" (*id.* at 25a).

Finally, the district court noted its disagreement with the decision of Judge Ramirez in *Keene* v. *Smith*, 569 F. Supp. 1513 (1983), subsequent opinion, 619 F. Supp. 1111 (E.D. Cal. 1985), prob. juris. noted *sub nom. Meese* v. *Keene*, No. 85-1180 (Apr. 21, 1986). The court indicated its view that, contrary to Judge Ramirez's ruling, "[t]he speculative nature of such injuries [alleged by the plaintiff in *Keene*] should have precluded a finding of standing" (Pet. App. 29a n.10). In addition, in contrast to Judge Ramirez' analysis, the court below concluded that Congress, in using the term "political propaganda" in FARA, did not act "to impose negative connotations on the materials so as to deter audience viewing" (*id.* at 28a); rather, "Congress sought to inform the public of the nature of foreign materials on 'matters which on the domestic level would be called a policy matter' " (*id.* at 31a, quoting H.R. Rep. 1470, 89th Cong., 2d Sess. 7 (1966))—a " 'particularly sensitive area[] in which the line between

political and non-political action is difficult to define' " (Pet. App. 30a, quoting H.R. Rep. 1470, *supra*, at 4).

4. On May 16, 1984, petitioners appealed the district court's judgment to the United States Court of Appeals for the District of Columbia Circuit. The court of appeals heard oral argument on February 12, 1985, and the case remains under submission.

ARGUMENT

1. Petitioners urge the Court to grant a writ of certiorari before judgment in order to consider this case together with *Meese* v. *Keene*, prob. juris. noted, No. 85-1180 (Apr. 21, 1986). To the extent that petitioners wish to be heard on the questions that are presented in *Keene*, their interests are adequately protected by the opportunity to appear as amici curiae in that case. In fact, petitioners did submit an amicus brief at the jurisdictional stage in *Keene*.

Petitioners do not confine themselves to the questions presented in *Keene* and instead invite the Court to address several issues that *Keene* does not raise. However, petitioners have failed to demonstrate that those issues warrant this Court's review at all, let alone that they satisfy the stringent standard for certiorari before judgment:

> A petition for a writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court.

Sup. Ct. R. 18. See also *Coleman* v. *Paccar Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, Circuit Justice) (certiorari before judgment "is an ex-

tremely rare occurrence"). As the petition itself makes clear, the new issues that petitioners seek to interject merely involve statutory questions on which there is no conflict in the circuits.

Indeed, certiorari before judgment would be especially unwarranted in the circumstances of this case. Because the district court dismissed the complaint on grounds of standing without reaching the merits of petitioners' claims, there has been no ruling below on the issues of statutory construction raised by petitioners. Thus, the Court is being asked not to review a decision of a lower court but instead to pass upon these issues in the first instance, much like a district court acting on cross-motions for summary judgment. Moreover, to our knowledge, *no* court has adjudicated the issues advanced by petitioners, and consequently this Court would be without the benefit of the considered views of the federal courts and their thorough exploration of the legal issues. See *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984); *Califano* v. *Yamasaki*, 442 U.S. 682, 701-702 (1979); *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977).[1]

Finally, since the case has already been briefed and argued in the court of appeals, it would be a waste of judicial resources to forestall at this juncture a decision that has been under advisement for some 15 months.

Just as an amicus curiae is not permitted to expand the questions presented by the parties (see, *e.g.*, *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981)), so too petitioners, as strangers to

---

[1] In their amicus brief at the jurisdictional stage in *Keene* (at 3, 5-6, 19), petitioners emphasized the importance of allowing the court of appeals to proceed to decision in *Block*.

the *Keene* litigation, should not be allowed to introduce new issues into that case. If the court of appeals had decided *Block* after probable jurisdiction was noted in *Keene*, this Court's normal practice would be simply to hold a petition for certiorari in *Block* pending the outcome of *Keene*. Surely there is no more reason here, where the court of appeals has not yet rendered its decision, for this Court to grant review. Accordingly, the petition for a writ of certiorari before judgment should be denied. See *Merck & Co.* v. *Staats*, cert. before judgment denied, 449 U.S. 1038 (1980); *SmithKline Corp.* v. *Staats*, cert. before judgment denied, 449 U.S. 1038 (1980).

2. Petitioners nevertheless argue that considerations of sound judicial administration militate in favor of certiorari before judgment in this case. For the reasons discussed above, however, sound judicial management hardly counsels that the Court should grant certiorari before judgment on statutory questions that do not now warrant review and that have not been decided by either of the courts below or by any other court. In any event, petitioners' substantive contentions are without merit,[2] and granting certiorari before judgment in this case would not result in the advantages that petitioners claim.

a. Petitioners first assert that the three Canadian films were not properly classified under FARA because the term "political propaganda" in the Act applies only to materials that are "subversive—*i.e.*,

---

[2] Because petitioners have not addressed the merits of the questions they present and do not rely on the merits as a basis for certiorari before judgment, we shall outline our position on those issues only briefly. For the convenience of the Court, a copy of the government's brief in the court of appeals is being lodged with the Clerk.

designed to overthrow the United States government illegally or to damage the nation—or 'propaganda' in the commonly accepted usage of that term—*i.e.*, put forward with ulterior motives as part of an effort to mislead" (Pet. 11-12 (footnote omitted)). They urge the Court to address this statutory issue in order to obviate the issue presented in *Keene* of whether the phrase "political propaganda" in FARA is unconstitutionally pejorative (see Pet. 3-4, 11, 13).

Petitioners' argument is insubstantial. As we discuss in our jurisdictional statement in *Keene* (at 13-17, 21-25), the statutory term "political propaganda" has a neutral meaning that is not pejorative or derogatory. This is clear from the face of the statute, which expressly defines "political propaganda" in a neutral and valid way, and from the legislative history of the Act, which demonstrates that Congress did not intend the term to have a more limited, disparaging construction. Moreover, petitioners' interpretation is inconsistent with the settled application of the statute since the time of its enactment more than four decades ago. In short, there is no basis for the contrived definition that petitioners seek to impress on the statute.

Nor would this issue enable the Court to avoid consideration of our constitutional argument in *Keene*.[3] An integral part of our analysis in *Keene* is that the phrase "political propaganda" in FARA has a neutral rather than a pejorative meaning—precisely the issue that petitioners raise in support of their request for certiorari before judgment. Thus, granting review in this case would not eliminate the

[3] As shown by our jurisdictional statement in *Keene*, the validity of FARA is sufficiently clear that the Court need not strain to construe the statute to avoid a constitutional problem.

need for the Court to confront our submission in *Keene*. Conversely, certiorari before judgment is not necessary here to allow the Court to consider the congressional understanding of the term "political propaganda." [4]

b. Petitioners also assert that FARA applies only to materials that are "transmitted in a foreign principal's *political* interest" (Pet. 12-13 (emphasis in original)) and therefore that the Act does not extend to the three Canadian films because they were distributed "solely for artistic and commercial, not political, purposes" (Pet. 13). This proffered reading of the Act is plainly incorrect. By its terms, the statute requires only that materials satisfying the definition of "political propaganda" in 22 U.S.C. 611(j) be transmitted "for or in the interests of such foreign principal." 22 U.S.C. 614(a). Nothing in Section 614(a) differentiates among the various possible interests of the foreign principal, which at all events could not be readily determined in most instances. In fact, the language "for or in the interests of" a foreign principal, upon which petitioners' argument rests, was added in 1966 simply to clarify that the Act does not cover the dissemination of materials by foreign agents acting in their own interest rather than in the interest of the foreign

---

[4] In the particular circumstance involved in *Keene*, where the statutory issue is essentially subsumed in the constitutional question presented, the Court would be free—even without granting certiorari before judgment in *Block*, and even though the statutory issue was not separately raised in the district court in *Keene*—to give the term "political propaganda" a narrow definition if, in undertaking the constitutional analysis in *Keene*, it concludes that the Act should be so construed. Cf. *United States* v. *Albertini*, No. 83-1624 (June 24, 1985), slip op. 4.

principal. See H.R. Rep. 1470, 89th Cong., 2d Sess. 13 (1966).

In addition, this statutory issue does not present a limiting construction that would obviate the question of the constitutionality of the phrase "political propaganda" in FARA. The constitutional validity of the definition of "political propaganda" in 22 U.S.C. 611(j) is entirely distinct from the issue whether, in order to be covered by the Act, such materials must be disseminated in the political interests of the foreign principal under 22 U.S.C. 614(a). While petitioners' construction, if accepted, would avoid the need to rule on the constitutional question in *Keene* itself, it would neither prevent the constitutional question from arising in FARA cases in the future nor change in any way the nature of that question. Especially since this statutory issue was not raised below in *Keene* and is not subsumed in our jurisdictional statement, it provides no basis for granting certiorari before judgment here.

c. Section 614(a) of Title 22 requires that foreign agents file dissemination reports "setting forth full information as to the places, times, and extent" of their transmittals of materials covered by the Act. In addition, 22 U.S.C. 620 provides that "[t]he Attorney General may at any time make * * * [and] prescribe * * * such rules, regulations, and forms as he may deem necessary to carry out the provisions of this subchapter." Pursuant to those provisions, Department of Justice regulations and prescribed forms, 28 C.F.R. 5.401(b) (see Pet. App. 44a-45a), specify that the required dissemination reports shall "[l]ist names and addresses of persons or organizations receiving 100 copies or more [of covered materials]" and, for films, identify the "[n]ame of

[the] station, organization or theater using [the film]," the "[d]ate or dates [the film was] broadcast or shown," and the "[e]stimated attendance." Petitioners argue (Pet. 14) that this regulation exceeds the scope of the Attorney General's statutory authority.

This issue—which was not raised in *Keene* and has never been decided by any court [5]—does not justify the grant of certiorari before judgment here. The validity of the regulation under the Act does not bear on the constitutionality of the phrase "political propaganda" in FARA. Moreover, petitioners have utterly failed to substantiate their bare assertion that the regulation "go[es] well beyond" (Pet. 14) the statutory provision that foreign agents submit reports to the Attorney General "setting forth full information as to the places, times, and extent" of their dissemination of covered materials (22 U.S.C. 614(a)). Nor have petitioners offered any ground to overcome the deference that is accorded an agency's interpretation of the statute it administers. See, *e.g.*, *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). In short, this issue plainly does not warrant review by certiorari before judgment and would only add another, unrelated question to those presented in *Keene*.

d. Finally, petitioners contend that certiorari before judgment is appropriate to consider the issue of their standing to sue. In petitioners' view, their claim of standing is stronger than that of Keene. Thus, petitioners argue, review in this case would obviate the need to resolve the issue of Keene's stand-

---

[5] Indeed, petitioners themselves did not raise this statutory issue in the court of appeals in this case.

ing and better enable the Court to reach the merits of the constitutionality of FARA.

We, of course, agree with petitioners' recognition (Pet. 17, 19) that Keene's standing is at best open to substantial doubt. But that consideration provides no basis for certiorari before judgment.

First, as explained in our brief in the court of appeals (at 16-39), we do not believe that petitioners—any more than Keene—have standing to bring this lawsuit. Indeed, the district court so held here. Accordingly, notwithstanding petitioners' blithe assertions, their standing is far from clear.

Moreover, review in this case would not obviate the need to address the question of standing. On the contrary, it would simply require the Court to resolve the standing of one plaintiff rather than another. And if, as we contend, Keene is held to lack standing, and if a court in the future should again invalidate the "political propaganda" provision, there will be time enough for this Court to consider the constitutionality of FARA in a case that works its way through the judicial system in the normal course.[6]

In addition, the Court's resolution of the question of standing in *Keene* will illuminate if not dispose of

---

[6] Petitioners' reliance (Pet. 4) on *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), is misplaced. First, in contrast to the instant situation, the "companion cases" decided in *McCulloch* "involv[ed] the same facts" (372 U.S. at 12) and presented the identical legal issue. Furthermore, granting certiorari before judgment in the related cases enabled the Court to avoid a jurisdictional question in the lead case and thus to reach the merits of the issue that warranted its review; here, on the other hand, review in *Block* would not obviate the question of standing but would simply substitute one standing issue for another.

the issue of standing in this case. If the court of appeals had already decided petitioners' case, this Court's customary approach would be to hold the ensuing petition for certiorari pending decision of *Keene*. There is no reason for any different treatment here, especially since petitioners seek the extraordinary step of circumventing the court of appeals altogether.

We also note the inconsistency in petitioners' position before this Court. On the one hand, they urge the Court to grant certiorari before judgment on the issue of standing in order to ensure that the Court reaches the merits of the constitutionality of FARA. On the other hand, as discussed above, they urge the Court to grant certiorari before judgment on certain statutory issues in order to obviate the need for the Court to consider the merits of the constitutional issue. Petitioners certainly cannot have it both ways. But beyond that, petitioners have presented no reason that would warrant certiorari before judgment in this case on any issue.

e. Petitioners are not aided by the cases they cite regarding certiorari before judgment (Pet. 3 n.1). None of those cases concerned an attempt, as here, to interject new and separate issues into a pending proceeding. Rather, in those instances in which the Court has granted review, the issues raised in the respective cases were substantially identical. Moreover, on each occasion, the decisions under review either involved the same court of appeals, so that the circuit had already passed upon the legal question presented in the petition for certiorari before judgment,[7] or pertained to a single dispute and presented

---

[7] See *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946), and *Porter* v. *Lee*, 328 U.S. 246, 251 n.3 (1946); *Johnson* v. *Fleet Corp.*,

potentially inconsistent legal obligations that could not be jointly fulfilled by the parties.[8] No comparable circumstances are presented in this case, and the exceptional procedure for certiorari before judgment is inappropriate here. See *Merck & Co.* v. *Staats*, cert. before judgment denied, 449 U.S. 1038 (1980); *SmithKline Corp.* v. *Staats*, cert. before judgment denied, 449 U.S. 1038 (1980).

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LEONARD SCHAITMAN
HAROLD J. KRENT
Attorneys

JUNE 1986

---

280 U.S. 320, 322-325 (1930). See also *Taylor* v. *McElroy*, 360 U.S. 709, 709-710 (1959), and *Greene* v. *McElroy*, 360 U.S. 474 (1959).

[8] See *New Haven Inclusion Cases*, 399 U.S. 392, 414, 418 (1970); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12 (1963). See also *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 671-674 (1979); *Hannah* v. *Larche*, 363 U.S. 420, 422-423 & n.3, 428-430 (1960).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20243